

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANNA LARRISON)	
Claimant)	
VS.)	
)	
J. E. DUNN CONSTRUCTION COMPANY, INC.)	Docket No. 150,543
Respondent)	
AND)	
)	
BUILDERS' ASSN. SELF-INSURERS' FUND)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Award dated August 8, 1995, entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument January 4, 1996.

APPEARANCES

Davy C. Walker of Kansas City, Kansas, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 39.34 percent work disability. Respondent and its insurance carrier asked the Appeals Board to review the issues of: (1) nature and extent of disability; and (2) average weekly wage. Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified to increase claimant's work disability to 56 percent.

(1) The parties stipulated that claimant sustained a work-related back injury on February 21, 1990, while working as a bricklayer. That injury resulted in a 15 percent whole body functional impairment. After considering the nature and extent of claimant's injuries, the Administrative Law Judge found that claimant lost 30 percent of her ability to perform work in the open labor market and 58 percent of her ability to earn a comparable wage as a result of the back injury.

Respondent argued that claimant refused to attempt to perform an accommodated job which paid a comparable wage and, therefore, claimant's permanent partial disability benefits should be limited to those based upon the functional impairment rating. The Administrative Law Judge found that claimant could not perform the offered job and found that claimant had proven a work disability. The Appeals Board agrees with that part of the Administrative Law Judge's analysis.

After the accident respondent offered claimant an opportunity to return to work laying patio bricks. Claimant testified she was unable to perform that work because it would require her to constantly bend over. Claimant also testified that she continues to regularly experience pain and muscle spasms in her low back, hips, and legs which severely restrict her activities. According to claimant, because of her back complaints she is unable to complete an entire work week at her present job as a bartender which she describes as requiring very little physical activity.

Board-certified orthopedic surgeon Robert J. Takacs, M.D., treated claimant between April 9, 1990, and June 29, 1990. Upon beginning treatment, he diagnosed lumbar disk injury and recommended both epidural cortisone injections for pain control and physical therapy. An MRI taken during the course of treatment indicated that claimant injured two lumbar disks at the L4-5 and L5-S1 intervertebral levels. The radiologist who reviewed the MRI believed that claimant had torn the annulus which is the disk's outside lining. Dr. Takacs did not believe either disk had ruptured or herniated. Because of claimant's persistent symptoms the doctor ordered an electromyograph test (EMG) which was performed and interpreted as normal. Dr. Takacs acknowledges that claimant completed the work-hardening program he prescribed but it did not help claimant recover. In fact,

claimant was discharged from the work-hardening program due to lack of progress. At that point Dr. Takacs released claimant to return to work with the restrictions of not working beyond the medium exertional level as defined by the U.S. Department of Labor. Dr. Takacs was not asked his opinion whether claimant could perform the job respondent had offered claimant.

Board-certified orthopedic surgeon Ronald Zipper, D.O., testified that he examined claimant in April 1994 at her attorney's request. He found muscle spasm over the lumbar spine and diagnosed herniated disks at L4-5 and L5-S1 with a referral pattern of discogenic injury. Based on his examination, Dr. Zipper did not believe that claimant had reached maximum medical improvement and that, ideally, claimant should undergo a repeat MRI, neurologic consultation, and EMG. He also felt that claimant needed anti-inflammatory medications and, if she did not undergo surgery, would need future courses of epidural blocks and a pain management program. He felt claimant should be restricted to light and sedentary work.

When considering the entire evidentiary record, the Appeals Board finds claimant's testimony persuasive that she could not physically perform the job of laying sidewalk brick that respondent offered. Therefore, claimant did not act unreasonably by declining to attempt to perform the job which respondent offered. The Appeals Board has considered the principles set forth in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Appeals Board finds that case is not applicable to the facts presently under consideration.

Based upon the report and testimony of economist Stephen L. Sturdevant, Ph.D., the Appeals Board finds that claimant lost between 30 and 53 percent of her ability to perform work in the open labor market considering Dr. Takacs' and Dr. Zipper's medical restrictions, respectively. Dr. Sturdevant also testified that claimant had a 70 percent loss of ability to earn a comparable wage comparing claimant's hourly rate on the date of accident, or \$14.35, to the \$4.25 she presently earns working at a small tavern. Comparing claimant's average weekly wage of \$575.67, as determined below, to claimant's present weekly wage of \$170, also yields a 70 percent wage loss.

Because hers is an "unscheduled" injury, the computation of permanent partial disability benefits is governed by K.S.A. 1989 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent

partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

Considering the percentages of loss set forth above, the Appeals Board finds claimant has an approximate 42 percent loss of ability to perform work in the open labor market and a 70 percent loss of ability to earn a comparable wage. Based upon those percentages of loss, the Appeals Board is unable to adopt the Administrative Law Judge’s conclusion that claimant has a 39.34 percent work disability.

In determining permanent partial general disability, K.S.A. 1989 Supp. 44-510e requires the Appeals Board to consider both claimant’s 42 percent loss of ability to perform work in the open labor market and the 70 percent loss of ability to earn a comparable wage. Although the Appeals Board is not required to average those losses, there appears no reason not to do so. Therefore, the Appeals Board finds that claimant has a 56 percent work disability for which she is entitled to receive permanent partial general disability benefits.

(2) Claimant’s average week wage is \$575.67 which is comprised of \$405.67 for base wages and overtime, and \$170 for additional compensation items. The parties stipulated to the \$405.67 figure and the \$170 figure was derived by converting the hourly additional compensation amount of \$4.25 to a weekly amount. The \$4.25 figure was obtained from Dr. Sturdevant’s letter dated December 28, 1994, which was admitted into evidence without objection.

(3) The Appeals Board adopts the Administrative Law Judge’s findings and conclusions to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated August 8, 1995, entered by Administrative Law Judge Robert H. Foerschler should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Anna Larrison, and against the respondent, J. E. Dunn Construction Co., and its insurance carrier, Builders’ Assn. Self-Insurers’ Fund, for an accidental injury which occurred February 21, 1990, and based upon an average weekly wage of \$575.67 for 21.29 weeks of temporary total disability compensation at the rate of \$271 per week, or \$5,769.59, followed by 393.71

weeks of permanent partial disability benefits at the rate of \$214.93 per week, or \$84,620.09, for a 56% permanent partial general disability, making a total award of \$90,389.68.

As of December 30, 1996, there is due and owing claimant 21.29 weeks of temporary total disability compensation at the rate of \$271 per week, or \$5,769.59, followed by 336.42 weeks of permanent partial disability compensation at the rate of \$214.93 per week in the sum of \$72,306.75 for a total of \$78,076.34, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$12,313.34 is to be paid for 57.29 weeks at the rate of \$214.93 per week, until fully paid or further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
Wade A. Dorothy, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director